UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 09-9509-MMM (JEMx) Date March 30, 2010

Title Buckley H. Crispin v. Christian Audigier, Inc.
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Present: The Honorable John E. McDermott, United States Magistrate Judge

S. Anthony		
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: (IN CHAMBERS) ORDER RE PLAINTIFF'S MOTION TO QUASH DEFENDANTS' THIRD PARTY SUBPOENAS

Plaintiff Buckley Crispin is a graphic artist who brings this action for breach of contract and copyright infringement against claimed licensee Christian Audigier, Inc. ("Audigier") and its sublicensees. Crispin alleges that Audigier used Crispin's artwork on unauthorized products and without displaying Crispin's logo. Crispin also alleges that Audigier sublicensed Crispin's designs without express written consent.

After Crispin filed his complaint, Defendant Audigier issued subpoenas to four nonparties which Crispin seeks to quash. The Court denies the Motion to Quash in part, grants it in part and limits the scope of some of the requests.

A. Legal Standards Governing Discovery, Subpoenas and Protective Orders

The federal policy of discovery is a liberal one. Miller v. Pancucci, 141 F.R.D. 292, 296 (C.D. Cal. 1992). Federal Rule of Civil Procedure Rule 26(b)(1) provides that parties are permitted to discover "any nonprivileged matter that is relevant to a party's claim or defense." Relevant matter need not be admissible at trial if "reasonably calculated to lead to the discovery of admissible evidence." Id.

Rule 45(a)(1)(C) permits any party to issue a subpoena for electronically stored documents from a third party but on motion an issuing court must quash or modify a subpoena that requires disclosure of privileged, trade secret or other confidential information. Rule 45(c)(3)(A)(iii) and 45(c)(3)(B)(i). In addition, courts have broad authority under Fed. R. Civ. P. 26(c) to issue protective orders regarding discovery. Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990).

The burden of persuasion in a motion to quash is on the moving party. Green v. Baca, 226 F.R.D. 624, 653-54 (C.D. Cal. 2005); see also Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48-49 (S.D.N.Y. 1996); Finley v. Pulcrano, 2008 WL 4500862, *1 (N.D. Cal. 2008). "'The party issuing the subpoena must demonstrate[, in turn,] that the information sought is relevant and material to the allegations and claims at issue in the proceedings.'" Green, 226 F.R.D. at 654 (brackets in original) (quoting Night Hawk Ltd. v. Briarpatch Ltd., L.P., 2003 WL 23018833, *8 (S.D.N.Y. 2003)); see also Finley, 2008 WL 4500862, *1.

A party seeking a protective order must show "good cause" why a protective order is necessary. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1063 (9th Cir. 2004); Phillips ex rel Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1210-11 (9th Cir. 2002); Gray, 133 F.R.D. at 40. Good cause requires the movant to demonstrate "specific prejudice or harm" if no protective order is granted. Phillips, 307 F.3d at 1210-11. Broad unsubstantiated allegations of harm are not sufficient. Id. at 1211. Where harm is demonstrated, a court must balance the parties' and public's interests in deciding whether a protective order is necessary. Id.

B. Background

The First Amended Complaint ("FAC") alleges that, between November of 2005 and January of 2006, Crispin entered into an oral license with Audigier to use Crispin's tattoo style artwork on Audigier's clothing line. (See FAC ¶¶ 26, 42.) Audigier asserts that it paid $1,100 for each of 15 drawings. (Joint Stipulation ("JS") at 6.) Crispin has registered the artworks with the United States Copyright Office. (FAC ¶ 27.)

Crispin claims that the oral license was limited only to Audigier's apparel line, required use of Crispin's logo to give reasonable attribution to him, and did not provide any authorization to sublicense to third parties. (FAC ¶¶ 26-35.) Crispin further claims that Audigier used Plaintiff's designs on products other than apparel, repeatedly failed to use Crispin's logo and even attributed others as the source of the art, and entered into numerous sublicenses of Crispin's artwork. (FAC ¶¶ 29-35, 43.) All of these activities, say Crispin, exceed the scope of the license, were unauthorized, and constitute copyright infringement. (FAC ¶¶ 37, 49.)

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Crispin presents two primary claims for relief. The first is a breach of contract claim seeking damages against Audigier (1) for use of Crispin's artwork on allegedly unauthorized product lines, (2) for Audigier's failure to use Crispin's logo on products, and (3) for Audigier's allegedly unauthorized sublicenses to the other third-party defendants. (FAC ¶ 43.)

Crispin's other primary claim for relief is for direct, contributory, and vicarious copyright infringement against Audigier and its sublicensee defendants. Crispin seeks disgorgement of their profits for exploitation of the artwork outside the scope of the license. Crispin claims both that Audigier's breaches were so material that all rights to the artwork should be restored to Crispin (FAC ¶ 49) and also that an injunction should be issued prohibiting Audigier's further use of the artwork without Crispin's seal and any use of the artwork by Audigier's sublicensees. (FAC ¶ 56.)

There may be a jurisdictional question. Crispin alleges an oral nonexclusive license. A copyright owner who grants a nonexclusive license to his copyrighted material generally waives his right to sue for infringement and can sue only for breach of contract under state law. Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1121 (9th Cir. 1999); Huebbe v. Oklahoma Casting Co., 663 F. Supp. 2d 1196, 1209 (W.D. Okla. 2009). If the license is limited in scope and the licensee exceeds it, then the owner can bring an infringement suit. Sun, 188 F.3d at 1121.

Audigier disputes Crispin's allegations but has not yet presented its own characterization of what rights it obtained in 2005 and 2006 and the scope of those rights. Audigier has made statements that it purchased Crispin's artwork (JS 12; Docket No. 25, Def. Opp. 3), but a transfer of ownership of copyrighted material requires a writing to be valid. 17 U.S.C. § 204(a); Foad Consulting Group, Inc. v. Azzalino, 270 F.3d 821, 825 (9th Cir. 2001); Effects Associates, Inc. v. Cohen, 908 F.2d 555, 556 (9th Cir. 1990). There may be an issue of whether the checks that Audigier wrote for the artwork constitute a writing for purposes of the Copyright Act. (JS 12.) Audigier may be claiming ownership under the work for hire doctrine, which also requires a writing. 17 U.S.C. § 201(b); Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc., 128 F.3d 872, 876 (5th Cir. 1997). The use of a check to satisfy the Copyright Act's writing requirements for a transfer of ownership or application of the work for hire doctrine seems a stretch but that issue has not been decided yet.

The parties, then, are in disagreement over the nature, terms and scope of whatever rights were transferred to Audigier. Discovery obviously will be essential to determine the terms and scope of the parties' agreement, and for that matter whether a valid contract even was formed.

C. The Subpoenas

Audigier has served four subpoenas. Three are directed to internet businesses Facebook, MySpace, and Media Temple. These subpoenas seek Crispin's basic subscriber information, communications regarding fellow tattoo artist Bryan Callan (more about him later), and communications regarding the defendants. This information, says Audigier, is necessary and relevant to determine the nature and terms of whatever agreement was reached between Crispin and Audigier.

The fourth subpoena is directed to Black Market Art Company, which sells products with Crispin's designs, but not the designs in dispute in this case. Audigier seeks sales information on all apparel with artwork created by Crispin and sold through the Black Market Art Company website. Audigier contends that this information is relevant to the measure of damages, should Crispin prevail on the merits.

Crispin alternatively seeks a protective order. The third parties apparently have not objected to the subpoenas and did not submit declarations in support of Crispin's Motion. MySpace already has produced the requested information which has not been accessed yet by Audigier.

D. Subpoenas to Facebook, MySpace, and Media Temple

Crispin objects to the subpoenas to the internet businesses Facebook, MySpace, and Media Temple on three grounds: (1) the subpoenas seek information that is irrelevant as a matter of law because copyright ownership cannot be transferred without a writing nor may sublicensing occur without a writing; (2) the information is protected from disclosure by the Stored Communications Act; and (3) the subpoenas are overly broad and would require disclosure of information protected by the marital privilege, the attorney-client privilege, the trade secret doctrine, and Crispin's privacy rights.

1. The Copyright Act Does Not Render The Information Sought by The Subpoenas Irrelevant

Plaintiff contends that the subpoenas to Facebook, MySpace, and Media Temple seek information that is irrelevant to any breach of the alleged oral license because the transfer of ownership claimed by Audigier required a writing. (JS 3-4, 11-13.) This argument begs the question. At this stage of the proceedings, there is uncertainty and disagreement over what exactly was transferred from Crispin to Audigier in 2005 and 2006, i.e., whether there was a transfer of ownership or an oral nonexclusive license and what the scope and terms of the transfer were. Discovery is necessary for a determination of those issues.

Crispin is correct that a transfer of ownership requires a writing. Section 101 of the 1976 Act defines a "transfer of copyright ownership" as "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license." 17 U.S.C. § 101 (emphasis added). To be effective, a transfer of ownership must be in writing. 17 U.S.C. § 204(a); Foad, 270 F.3d at 825; Effects, 908 F.2d at 556. So must a work for hire. 17 U.S.C. § 201(b); Lulirama, 128 F.3d at 876. Crispin also is correct that an exclusive licensee may not sublicense to others without the express written consent of the owner. Gardner v. Nike, 279 F.3d 774, 781 (9th Cir. 2002).

These writing requirements, however, are not dispositive. Crispin is not alleging that there was any transfer of ownership or grant of an exclusive license. By definition, a nonexclusive license is not a transfer of ownership and does not require a writing. It may be oral or implied. Effects, 908 F.2d at 558; 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 10.03[A] at 10-36 (1989). Oral licenses essentially are unregulated. Foad, 270 F.3d at 827-28. The Act "places no particular emphasis on writings in the case of nonexclusive licenses." Id. at 828. State law will determine whether an owner has granted such a license. Id. at 827.

Crispin essentially argues that, because a writing is required for an exclusive licensee to sublicense, the same must be true for a nonexclusive license. Plaintiff cites no case for that proposition nor explains why, if no writing is required to effectuate an oral nonexclusive license, a writing is required for a nonexclusive licensee to sublicense. At least one case has held that a nonexclusive licensee can do anything the owner can do under 17 U.S.C. § 106, including authorize others to use the copyrighted material. Lulirama, 128 F.3d at 882.

The Copyright Act written consent requirement for exclusive licensees to sublicense the copyrighted material, then, may not apply to a nonexclusive licensee. We do not know, of course, whether there was a specific agreement that Audigier could or could not sublicense, although Crispin claims that the parties never discussed sublicensing. (JS 4.) Even so, Lulirama would permit sublicensing. Courts in this Circuit have not addressed the issue. There is no reason to resolve that issue here before development of an adequate factual record.

The Copyright Act does not render Audigier's discovery requests improper as a matter of law. At the very least, there is a fact question about the terms and scope of the oral license alleged here, and whether the oral license was as restricted as Crispin claims. Crispin does not address the issue of the scope of the license. Discovery is obviously necessary to determine the nature, terms, and scope of the oral license Crispin alleges he granted to Audigier.

2. The Stored Communications Act Does Not Bar Disclosure

Crispin argues that the subpoenas to Facebook, MySpace, and Media Temple should be quashed because they seek "electronic communications that third-party internet service providers are prohibited from providing under the Stored Communications Act . . . ." (JS 13.)

The Stored Communications Act ("SCA") provides that, with certain exceptions, "a person or entity providing an electronic communication service ["ECS"] to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). An ECS is defined as "any service which provides the users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2501(15). "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17).

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The parties disagree whether Facebook, MySpace, and Media Temple are ECS providers within the meaning of the SCA.[1] In Quon v. Arch Wireless, 529 F.3d 892, 902 (9th Cir. 2008), the Ninth Circuit found that a provider of text messaging services who stored text messages in its backup system was an ECS provider. Id. A company that "served as a conduit for the transmission of electronic communications from one user to another, and stored those communications 'as a "backup" for the user'" was an ECS provider. Id. (quoting Theofel v. Farey-Jones, 359 F.3d 1066, 1075 (9th Cir. 2004)). As a general matter, courts have found entities that provide internet access, email services, or text messaging services are ECS providers under the SCA, but have found that businesses providing products or services on or through the internet are not ECS providers. See Quon v. Arch Wireless, 529 F.3d 892, 902 (9th Cir. 2008) (provider of text messaging and pager services was ECS provider); Dyer v. Northwest Airlines Corp, 334 F. Supp. 2d 1196, 1199 (D.N.D. 2004) (business selling products and services over the internet, as opposed to access to the internet itself, is not an ECS provider); In re DoubleClick Inc. Privacy Litig., 154 F. Supp. 2d 497, 511 n.20 (S.D.N.Y. 2004) (on-line merchants or service providers are not ECS providers); Crowley v. Cybersource Corp., 166 F. Supp. 2d 1263 (N.D. Cal. 2001) (on-line retailer is not an ECS provider).

Crispin has not offered any evidence that Facebook, MySpace, or Media Temple provide internet access or operate as conduits for the transmission of data from one location to another. He describes Facebook, MySpace, and Media Temple as follows:

> Media Temple, Inc. is a company which provides web hosting services with, *inter alia*, webmail and website content features. Facebook and MySpace, Inc. are companies which provide social networking websites that allow users to send and receive messages, through posting on user-created "profile pages" or through private message services.

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[1] Section 2702 also limits voluntary disclosures of customer communications or records by "a person or entity providing remote computing service to the public." Crispin does not contend, and the information before the Court does not reflect, that Facebook, MySpace, or Media Temple provide "remote computing service."

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(JS 14.) Crispin's arguments specifically indicate that each of these entities provides services on the internet, rather than access to it. Despite Crispin's conclusory characterization that Facebook and MySpace "allow users to send and receive messages," he acknowledges that this is achieved "through posting" of messages on those sites. Crispin provides no evidence that Facebook, MySpace, or Media Temple enable users to transmit or receive electronic communications. Rather, based on the description of their services set forth below, it appears that these entities host information on their servers that can be accessed by those who subscribe to their services. Accordingly, they are not ECS providers under the SCA.

Even if Facebook, MySpace, and Media Temple are ECS providers, the production of materials responsive to the subpoena is not prohibited by the SCA. Section 2702 explicitly governs "***[v]oluntary*** disclosure of customer communications or records." 18 U.S.C. § 2702 (emphasis added). Here, the disclosures would not be voluntary. Rather, materials would be produced in response to valid subpoenas and compelled by this Order. See Fed. R. Civ. P. 45(e) (failure to comply with subpoena without adequate excuse subjects recipient of subpoena to finding of contempt); see also 18 U.S.C. § 2707(e) ("good faith reliance on . . . a court [] order . . . is a complete defense to any civil . . . action brought under this chapter . . . or any other law."). 18 U.S.C. § 2707(e).

Moreover, the SCA only prohibits an ECS from voluntarily disclosing electronic communications "while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). Again, "electronic storage" includes only "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof" and "storage of such communication by an [ECS] for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). The materials sought from Facebook, MySpace, and Media Temple are not in "electronic storage," as that term is defined by the statute. The materials are held as the websites' content, not as communications in intermediate storage or as backup files. The information provided by Audigier supports his argument that the materials sought here are not in "electronic storage:"

> The webmail service offered by Media Temple is not "temporary" or "intermediate" storage "incidental" to the transmission of a communication. Nor is webmail a backup storage solution. Rather, webmail is a service that allows users to view email messages through a web browser while the messages remain on Media Temple's servers. *See* http://en.wikipedia.org/wiki/web_mail ("One advantage of webmail over application-based e-mail is that a user has the ability to access their inbox from any Internet-connected computer around the world.

> However, the need for Internet access is also a drawback, in that one cannot access old messages when not connected to the internet.")
>
> [M]essages on MySpace and Facebook are viewed in essentially the same way. According to Plaintiff, his Facebook and MySpace communications are posted on "user-created 'profile pages.'" Facebook's wall "is a space on each user's profile page that allows friends to post messages for the user to see." http://em.wikipedia.org/wiki/Facebook_features#Wall. Those messages can be viewed by anyone with access to the user's profile page, and are stored by Facebook so that they can be displayed on the Facebook website, not as an incident to their transmission to another place. *Id.* ("One user's wall is visible to anyone with the ability to see his or her full profile.") MySpace is the same, except the messages posted on the user's profile page are called "comments." http://em.wikipedia.org/wiki/Myspace#Comments. They, too, can be viewed by anyone viewing that profile page on the MySpace website. *Id.* ("Below the User's Friends Space (by default) is the 'comments' section, wherein the user's friends may leave comments for all viewers to read.").

(JS 25-26.) Crispin provides no contrary information.

It appears that the materials at issue here are stored primarily and permanently by Facebook, MySpace, and Media Temple for purposes of displaying them on their websites, not as an incident to their transmission to another location or for purposes of backup protection. Accordingly, the information and materials sought from Facebook, MySpace, and Media Temple are not in "electronic storage" and are not prohibited from disclosure by the SCA.

Crispin has failed to establish that the SCA bars the production of materials in the possession of Facebook, MySpace, and Media Temple, and Crispin's motion to quash the subpoenas on this basis of the SCA is denied.[2] These entities will be compelled to comply with the subpoenas, as modified herein.

3. Plaintiff's Other Arguments Are Generally Without Merit

Crispin's generalized overbreadth and privacy arguments regarding the third party subpoenas must be rejected for the most part. Crispin claims that the subpoenas "could" yield communications protected by marital privilege, attorney-client privilege, and the trade secret doctrine. Crispin, however, provides no declaration or basis for these assertions, never explains or supports his trade secret argument, and the subpoenas expressly exclude communications with Crispin's attorney.

Plaintiff's privacy rights must be balanced against a defendant's right to defend himself, and often can be mitigated by a protective order. Edwards v. County of Los Angeles, 2009 WL 4707996, *3 (C.D. Cal. 2009). The parties have not provided sufficient information for the Court to engage in the balancing process. Id. at *4.

The requests for all communications between Crispin and Callan are overbroad. The FAC does not mention Callan, and Callan's own artwork and lawsuit are unrelated to Crispin's lawsuit. The fact that Crispin and Callan spoke or that Callan has filed a similar suit means nothing unless tethered to this lawsuit. Nor should this lawsuit be used to obtain discovery for use in Callan's suit. Audigier's requests must be limited to communications between Crispin and Callan that are related to Audigier or its sublicensees. This ruling applies to Category 2 of the subpoenas to Facebook and MySpace, and Category 1, 2 and 3 of the subpoena to Media Temple. The Motion to Quash is denied with these exceptions.

[2] In Category 1 of the subpoenas to Facebook and MySpace, Audigier also seeks the production of Crispin's "basic subscriber information." Crispin does not appear to challenge the production of this information based on the SCA. Even if he did, such a challenge would be meritless because 18 U.S.C. § 2702(c)(6) expressly allows an ECS provider to produce "a record or other information pertaining to a subscriber or to a customer of such provider . . . to a person other than a governmental entity."

E. Subpoena to Black Market Art Company

Crispin also objects to the subpoena to Black Market Art Company ("Black Market") on grounds of burden, relevance, overbreadth, and trade secrets.

On relevance, Crispin argues that the Black Market subpoenas seek information on other artwork sold through Black Market not the subject of this lawsuit. Audigier counters that the information sought by the subpoenas is relevant to the measure of damages, should Crispin prevail.

Crispin asserts that sales of Audigier products with Crispin's artwork is driven by his designs, not the Audigier brand. 17 U.S.C. § 504(b), however, provides for apportionment where profit is derived from factors other than the copyrighted work:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer attributable to the infringement. . . . In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Id. (emphasis added). See also Cream Records, Inc. V. Jos. Schlitz Brewing Co., 754 F.2d 826, 828-29 (9th Cir. 1985). Audigier argues that sales of Black Market products that do not have a brand like Audigier's will help resolve whether and to what extent sales of Audigier products with Crispin designs are due to Audigier's brand or Crispin's designs.

Additionally, Audigier contends that the requested information will help establish the price at which Audigier products with Crispin's artwork would have sold if Crispin's logo had been displayed. On this question, Audigier bears the burden of establishing that the two products are substantially similar, which can involve expert testimony. Barcenas v. Ford Motor Co., 2004 WL 2827249 (N.D. Cal. 2004). This is difficult to do without first obtaining the necessary discovery. Desrosiers v. MAG Indus. Automation Systems, LLC, 2009 WL 5126222 (D. Md. 2009). At this stage, there is no reason to bar discovery of information that is reasonably calculated to lead to admissible evidence. The Motion to Quash is denied as to categories 1-3 and 5 of the Black Market subpoena.

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That said, the Black Market subpoena is overbroad. Categories No. 6 and 7 go beyond the purposes and scope of relevance asserted by Audigier. Categories 6 and 7 are unlimited in scope, seek all communications regarding Crispin or his artwork, and are not tied to claims or defenses in the lawsuit or to damages, as Categories 1-3 and 5 appear to be. The Motion to Quash is granted as to Categories 6 and 7.

On burden, Crispin does not have standing to object that compliance with the subpoena would be burdensome for Black Market. Auto-Owners Ins. Co. V. Southeast Floating Docks, Inc., 231 F.R.D. 426, 429 (M.D. Fla. 2005) ("Defendants do not have standing to quash the subpoenas on the grounds of oppression and undue burden placed upon third parties where the non-parties have not objected on those grounds"). Here Black Market has not objected or even submitted a declaration.

Auto-Owners, however, cited with approval a treatise that a party nonetheless may seek a protective order "if it believes its own interest is jeopardized by discovery sought from a third person." Id., citing Wright Miller & Marcus, Federal Practice and Procedure 2D § 2035; Finley, 2008 WL at *1. Crispin asserts confidential, trade secret information, and privacy interests. Much of the information sought by the subpoenas appears to be public like products and gross sales information. In any event, Crispin has made but broad allegations of harm and has not made any demonstration of "specific prejudice or harm." Crispin has not provided the Court with declarations or the required information even to engage in the balancing process for ruling on his request for a protective order.

Category No. 4, seeking payments made by Black Market to Crispin, presents great difficulty. Crispin has an obvious interest in not revealing payments made to him, i.e., his profit, to the general public. Nor is it immediately apparent to the Court why Crispin's profit is relevant to Audigier's purported discovery purposes or to this lawsuit. Ultimately, the decisive damage issue is Audigier's profit, not Crispin's. The Court can see how Black Market's gross sales might bear on Crispin's damages theories, but Audigier has not demonstrated why Crispin's profit data is needed.

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The Court denies Crispin's Motion to Quash Category No. 4 without prejudice but orders that Black Market not produce the information for now. The parties are ordered to submit additional briefing on Category No. 4. The parties also should meet and confer on a protective order that prevents disclosure of Category 4 information to the general public.

cc: Parties

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